Chapter 11. Evidence

References:

Regulations: 8 CFR103

11.1 Consideration of Evidence

(a) General. A major part of your duties as an adjudicator will involve gathering, handling and evaluating evidence. The purpose of gathering evidence is to establish the truth (or falsity) of some fact or matter at issue. The Federal Rules of Evidence (FRE), which are codified at 28 U.S.C. 2075, are a good reference point for discussions of evidence. See also *Special Agent's Field Manual*, Appendix 11-3. You should be aware that these rules are not binding in administrative proceedings. Generally, any oral or documentary evidence that is relevant and material may be accepted into the administrative record. This means that a particular piece of evidence must have a tendency (no matter how small) to either prove or disprove a fact that has a bearing on the issue at hand (materiality). Despite the relatively open admissibility of evidence in an administrative proceeding, you should familiarize yourself with the rules of evidence relating to these proceedings.

(b) Burden of Proof. The burden is on the petitioner to establish that he or she is eligible for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). This means that if an alien seeking a benefit has not shown eligibility, the application should be denied. The government is not called upon to make any showing of ineligibility until the alien has first shown that he is eligible. You should contrast this in your mind with a criminal case or with a deportation hearing in which the government must first prove its case before the individual must respond.

Once an applicant has met his or her initial burden of proof, he or she can be said to have made a "*prima facie case*." This means that the applicant has come forward with the facts and evidence which show that at a bare minimum, and without any further inquiry, he or she is eligible for the benefit sought. This does not mean that your inquiry is over. An alien may have established initial eligibility, but it is up to you to determine if there are any discretionary reasons why an application should be denied, or if there are any facts in the record (including facts developed during the course to the adjudicative proceedings, such as during an interview) which would make the applicant ineligible for the benefit. If such adverse factors do exist, it again is the applicant's burden to overcome these factors.

In adjudicating a petition for a benefit, you will often deal with evidence and facts which are of a documentary nature, such as marriage dates, dates of birth, death, divorce, criminal

records, school records, etc. This often brings into play what is known as the *"best evidence rule*". While the best evidence rule is not strictly applicable in an administrative proceeding, you should adhere to it as closely as you can. The rule states that where the contents of a document are an issue in a case, the document itself must be introduced rather than secondary evidence as to its content. For example, if an issue in an interview is the date on which a divorce decree became final, the divorce decree itself should be introduced, rather than a letter stating when the decree became final or a second marriage certificate stating the date of the first divorce. As you can see, the rule provides an external basis for verifying claimed facts. In considering the rule, you should be aware of one major exception. When a document is a public document, the contents of that document may be proved by a certified copy. Also, when a document is prepared in carbon or multiple copies, each copy is an "original" for purposes of the rule (as opposed to photocopies created after the fact).

(c) Primary and Secondary Evidence. Closely related to the best evidence rule is the concept of primary and secondary evidence. Primary evidence is evidence which on its face proves a fact. For example, the divorce certificate is primary evidence of a divorce. Secondary evidence is evidence which makes it more likely that the fact sought to proven by the primary evidence is true, but which cannot do so on its own face, without any external reference. In the above example, church records showing that an individual was divorced at a certain time would be secondary evidence of the divorce. You will often encounter situations in which primary evidence is unavailable. This does not give rise to a presumption of ineligibility. Title 8 CFR 103.2(b)(2) sets out the procedures relating to unavailability of documents. The Department of State's *Foreign Affairs Manual*, Part IV, Appendix C 800 provides country-specific information on availability of various foreign documents. The absence of a primary record may be proven by a written statement from the appropriate issuing authority attesting to the fact that no record exists or can be located or that the record sought was part of some segment of records which were lost or destroyed.

(d) Evidentiary Standards. Because the strict rules of evidence used in criminal proceedings do not apply in administrative proceedings, a wide range of oral or documentary evidence may be used in a visa petition proceeding or other immigration benefit application proceeding. Copies of public documents, certified by the person having custody over the original records, are generally admissible. Official foreign documents should be certified and authenticated, unless the country is signatory to the Hague Convention on Legalizations. [See *Special Agent's Field Manual*, Chapter 4.6 for more information on the Hague Convention and *Special Agents Field Manual*, Appendix 4-3 for a list of signatory countries.]

(e) Testimony of Witnesses: Competency and Credibility. You will frequently take testimony from witnesses in the course of your Service duties. As you have seen, the strict evidentiary standards that would be followed in a Federal court are not always applicable in an administrative proceeding. You will thus usually be free to accept the testimony of most witnesses. Still, in making an evaluation of witnesses, it is helpful to be familiar with some of the concepts relating to witnesses. In order for a witness to be legally fit to testify,

he or she must be competent to do so (also referred to as having the organic capacity to testify). Competency should be distinguished from credibility, which involves a witnesses' trustworthiness and believability. For example, a sane person who tells lies is competent, but not credible. An insane person who testifies insanely is neither competent nor credible. In regards to competency, you should remember a few points:

- First, the witness only needs to be mentally competent at the time he is to testify. Past or future mental deficiency may be relevant to credibility (believability), but does not affect a witness' ability to testify.

- Also, you should note that children are not incompetent to testify merely because of their age. Age is only a factor insofar as it renders a witness untrustworthy in his powers of observation and recollection.

- Finally, you should note that criminal convictions, even for the offense of perjury, do not disqualify one as a witness, although they certainly have a bearing on credibility.

In any situation where the testimony of a witness is questionable, you should supplement the record with the testimony of another witness or with other evidence relating to the same matter. In so doing you will be ensuring that your decision will stand up to future review in further administrative proceedings.

(f) Documentary Evidence. Documentary evidence includes all types of documents, records and writings and is subject to the same considerations regarding competency and credibility as is testimonial evidence, discussed in the preceding paragraph. Documentary evidence may be divided into two categories: public documents and private documents.

(1) Public Documents. Public documents are the official records of legislative, judicial and administrative bodies. Such documents, or copies thereof duly certified by their custodian, are generally admissible in evidence without the testimony of the officer who made the records. In administrative proceedings such documents are generally admissible, either in original/certified copy form or in the form of ordinary copies. See 8 CFR 103.2(b)(4). The Service may at any time request submission of an original document. Birth or baptismal records maintained by church officials are not considered public documents, but may be accepted as secondary evidence of birth, if the actual place of birth is indicated on the certificate. Delayed birth certificates are also not considered as conclusive evidence of birth.

(2) Nonexistence. The absence of an official record may be proven by a written statement by the officer ordinarily having custody of such records, or by an appointed deputy that after diligent search no record of the event is found to exist. Such a statement must be accompanied by a duly authorized authentication that the writer has legal custody of such records. Although generally accepted, there is one inherent weakness to such statements submitted in support of visa petitions and other applications for benefits...they rely on the other evidence submitted (unsubstantiated) about the location of the claimed event and record.

(3) Private Documents. Private documents include all documents other than official records of legislative, judicial or administrative bodies of government. Private documents, especially business records and tax records are often introduced as supporting evidence for visa petitions. Circumstances surrounding the creation of such records, such as evidence that a document was created immediately at the time of the event it purports to record, as part of the regular conduct of business, may affect the weight given to the document.

(g) Expert and Opinion Evidence. On occasion, you may require the testimony of an expert witness to assist in completing a case. Such a witness may be in the field of handwriting, fraudulent documents or a variety of other subjects. Generally, in federal court, testimony of lay witnesses regarding their opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his/her testimony or the determination of a fact at issue. See Rule 701, Federal Rules of Evidence.

One major exception to the "opinion evidence" rule is that which permits an expert to give his opinion on a particular set of facts or circumstances involving scientific, technical, or other specialized knowledge. In order to provide such opinion testimony the witness must be qualified as an expert by knowledge, skill, experience, training or education.

When an expert witness is offered, the Service must prove the experience and qualifications of the witness and the facts of the case at hand. The testimony of expert witnesses has been accepted by the Service, and findings based on their testimony have been upheld by the courts. In cases involving handwriting, counterfeit and altered documents, the Service's Forensic Document Laboratory may be used.

(h) Privileged Information. From time to time you may encounter the issue of privilege. A testimonial privilege allows the holder who invokes it to bar testimony that would violate the privilege. In Federal Court, as well as in an immigration proceeding, a claim of privilege will be decided on a case by case basis. See FRE 501. In contrast to incapacity of a witness, which cannot be waived, a privilege may be waived by the holder. Such a privilege may be waived by a failure to invoke the privilege. Some of the more common testimonial privileges are lawyer-client, husband-wife, and the privilege against self-incrimination.

Each privilege differs slightly as to details such as whose testimony may be barred and who may invoke the privilege. The scope of the material covered by the privilege also differs.

(1) Lawyer-Client Privilege. The lawyer-client privilege may be invoked by the client to prevent anyone from testifying about communications between the lawyer and client made for the purpose of facilitating legal services.

(2) Husband-Wife Privilege. There are two separate evidentiary privileges arising from the marital relationship. First, the marital adverse testimony privilege protects one spouse from testifying against the other during the marriage. A witness spouse alone has the privilege to refuse to testify adversely and may be neither compelled to testify nor

foreclosed from testifying. See *Trammel v. U.S.*, 445 U.S. 40 (1980). The second privilege prohibits disclosure of confidential communications made during the marriage. This second privilege can be invoked by the defendant to prevent his or her spouse from giving certain testimony. Generally, in either judicial or civil proceedings, one spouse can testify in a matter involving the other spouse if the testimony is:

- In behalf of the other spouse;

- Against the other spouse, if the matters arose before the marriage;

- Against the other spouse where it appears the marriage was not entered into in good faith, but with the intention of using the marriage ceremony in a scheme to defraud under the immigration laws;

- Against the other spouse in a prosecution under section 278 of the Act (importation of alien for an immoral purpose).

To avoid the possibility of an "unfair hearing" you should supplement, wherever possible, the adverse testimony of one spouse against the other with other evidence. You should also recall that it is the alien's burden to establish eligibility for a benefit. Thus, the failure to provide necessary evidence may result in denial of a petition if the alien's burden has not been met. See 8 CFR 103.2(b)(13) - (15).

(3) Self-Incrimination. Under the Fifth and Fourteenth Amendments to the Constitution, a witness may refuse to answer questions and to give testimony if the answers will incriminate or tend to incriminate the witness under Federal or state criminal laws. If a witness has already been convicted or if prosecution is barred, the privilege ceases to be applicable.

Removal or other proceedings of the Service are not criminal proceedings. An alien required to give self-incriminating evidence in such administrative proceedings cannot invoke the privilege against self-incrimination, unless his or her testimony might bring or tend to bring the alien within the proscription of a United States federal or state criminal statute.

If an alien is apprehended and (before being advised of the "Miranda" rights) makes certain admissions and produces documents which are used to establish deportability, such evidence does not violate his or her right against self-incrimination. Removal proceedings are civil in nature and not subject to the same constitutional safeguards as in criminal proceedings (*Chavez-Raya v. INS* 519 F.2nd 397 (1975)).

Self-incrimination relates to the disclosure of facts. The facts which are protected from disclosure are distinctly facts involving a criminal liability. The immunity afforded relates to the past and does not endow the person who testified with a license to commit perjury. Thus, where a witness had previously testified in one way but now claims the possibility of being prosecuted for perjury if required to testify again, the witness cannot

claim the privilege as a prospective perjurer. The privilege applies only to the person himself testifying, not to any third person or corporation.

(i) Rebutting Derogatory Evidence. Derogatory information, like supporting documentation, need not comply with the strict rules of evidence. However, the adjudicating officer must keep in mind that the applicant or petitioner must be afforded an opportunity to inspect and rebut adverse information, except certain classified materials, which should be discussed in general terms without jeopardizing the security of the information or the source. [See 8 CFR 103.2(b)(16) and *Matter of Tashir*, 16 I&N Dec. 56 (BIA 1976).

(j) Impeachment. Impeachment is the process of discrediting a witness. In both judicial and administrative proceedings, a witness' reputation for veracity is a pertinent avenue of attack for impeachment purposes. Questioning with a view to impeachment is often directed toward showing the witness' conviction of a crime affecting the witness' veracity or other matters tending to show insensibility to the obligations to tell the truth when under oath. A conviction for perjury is particularly pertinent. However, the fact that a witness is shown to have lied under oath on one occasion does not necessarily require a conclusion that the entire testimony is to be discredited.

Unimportant discrepancies in statements made by a witness do not necessarily discredit the witness. The fact that a witness is sometimes confused and self-contradictory goes only to the weight of testimony, not to the witness' competency. It is to be expected that even an honest witness in speaking of a past event will not repeatedly reproduce it in its entirety with unchanged fullness of detail. A variation in recollection does not necessarily damage credibility. In fact, if a number of witnesses agree exactly in their testimony as to the details of some event, collusion may be suspected. Of course, gross discrepancies on important points tend to discredit the witness. Bias for or against a party to a proceeding, interest in the outcome, and corruption (bribery or subordination of perjury or of other improper act) strongly tend to discredit a witness and are always appropriate subjects of inquiry for impeachment purposes. Where it is anticipated that important issues of fact will be contested in judicial or administrative proceedings, obtain and report all available information concerning witnesses which tend to impeach them.

Aliens or witnesses who have signed statements sometimes indicate that they desire to retract them or that they will give contrary testimony when later called upon to testify. Such witnesses cannot be prevented from retracting or changing prior statements. However, retraction of prior statements made under oath may, under certain conditions, render the witnesses liable for perjury. Furthermore, witnesses have a legal right to claim that written statements are not true and correct transcripts of what they actually said during an interview or that they were obtained by fraud or duress. Any such statements or claims made by a prospective government witness should always be reported.

(k) Other Considerations. There are other legal issues that you should be aware of in your duties as an adjudicator. For example, the administrative record you create will often be crucial in later proceedings relating to the same individual such as a rescission of status, possible deportation proceedings and relief from deportation, and investigations of fraud.

The administrative record will be crucial to a criminal investigator's examination of any fraud or abuse of the immigration laws.

The Jencks Act (18 U.S.C. 3500) requires that a statement in the possession of the United States which was made by a government witness be produced after he has testified upon demand of the defense. Failure by the government to produce the statement will require the suppression of that witnesses' testimony. The term "government witness" means someone called by the government to testify at the later criminal proceeding, not necessarily the administrative proceeding. Thus anyone who provides a "statement" at an administrative proceeding is a potential government witness within the meaning of the rule. The term "statement" has been broadly defined by the courts to include, besides written and signed affidavit form statements, such items as interview notes and tape recordings or other transcriptions of an oral statement. To avoid jeopardizing future criminal cases, the following steps should be taken: (1) retain all original notes of witness or defendant interviews; (2) retain all original notes made during surveillance operations; and (3) retain all original drafts of reports concerning interviews or surveillance operations if they are the first written record of the interview or surveillance. (There is no such requirement with regard to witnesses other than government witnesses.)

11.2 Video and Audio Taping.

(a) General. In many instances the adjudicator may audio or video tape an interview with an applicant or petitioner. The purpose of such a recording is to preserve evidence for possible use in later proceedings without expending significant resources creating a verbatim written record. Such recordings may be used as evidence for denying a benefit. However, if such a decision is subsequently appealed, it may be necessary to transcribe the text of the interview in order to introduce it before the immigration court or Board of Immigration Appeals. The Executive Office for Immigration Review has declined to accept from the Service either video or audio taped interviews as evidence unless they are so transcribed. Chapter 15 of this manual contains information on interview techniques, including the use of video and audio recording devices as an integral part of the interview process.

(b) Retention. Tapes (video or audio) used for routine interviews (e.g. marriage fraud, adjustment of status, or naturalization) may be erased for reuse within ten days unless:

- the application or petition is likely to be denied and the information contained on the tape is considered as evidence;

- an incident during the interview was recorded on the tape and the tape may be used either for training, or to support or refute allegations of misconduct by a Service employee.

Such tapes should be retained for a period of three years, and may be extended in yearly increments in the event of ongoing litigation.

11.3 Foreign Language Documents and Translations.

(a) Document Translations. All documents submitted in support of an application or petition must include complete translation into English. In addition, there must be a certification from the translator indicating that the translation is complete and accurate and attesting to his or her competence as a translator. See 8 CFR 103.2(b)(3).

NOTE: Sometimes the keeper of a record will issue an "extract" version of the document. This often happens in countries where the complete document is lengthy and filled with extraneous information. Such official extracts are acceptable, but only if they contain all the information necessary to make a decision on a case. For example, an official extract of a birth certificate which fully identifies the child's parents may be used in support of a visa petition; one which only lists the child's name and date and place of birth may not. Furthermore, only extracts prepared by an authorized official (the "keeper of record") are acceptable. A summary of a document prepared by a translator is unacceptable.

From time to time, you may have need to translate a document which is relevant to a case but not submitted as part of the supporting documents. In other instances, you may have reason to suspect the accuracy of a translation which has been submitted. Some Service offices have access to translation services provided by Service employees or others. In addition, the New York District Office provides translation services for documents in all major languages. Documents for translation may be mailed or faxed to the New York District Office to the attention of the supervisory language specialist at INS, 26 Federal Plaza, Room 5-506, New York, NY 10278. Fax Number: (202) 264-6830.

(b) Interpreters. If a statement is taken in a foreign language, using an interpreter, and transcribed into English, it may be necessary to produce the interpreter at a subsequent hearing. Thus, when it is known or believed that the statement will be attacked on the ground that it was not correctly interpreted, it is a good practice to have the interpreter available to testify not only as to knowledge of the language but also that the statement was correctly interpreted when it was made. If the interpreter is not a regular Service employee, the statement should show certification that the individual was a qualified interpreter and interpreted to the best of his or her ability. Furthermore, before anyone who is not a regular Service interpreter can be used in such capacity, he or she must first be sworn to give full, accurate and compete translation.

11.4 Administration of Oaths.

Service officers are authorized to administer oaths, pursuant to section 287(b) of the Act. In addition to certain applications which must be sworn to under oath, Service officers routinely conduct adjustment of status and naturalization interviews under oath. Sworn statements taken from the petitioner, beneficiary, applicant or other parties may also be required. In addition to oaths administered by Service officers, the Service recognizes oaths administered for immigration purposes by authorized military personnel as provided by Article 136 of the Uniform Code of Military Justice. The list of authorized military officers includes: judge advocates, law specialists, adjutants, commanding officers and other

designated by regulation.

The application forms for immigration benefits and regulations at 8 CFR 103.2(a)(2) require that each application and petition be signed by the applicant. By signing the form, the applicant or petitioner certifies, under penalty of perjury, that the information contained on the application and in all supporting documents is true and correct.

11.5 Outside Sources and Other INS Records.

Title 8 CFR 103.2(b) provides that the Service may consider other evidence from its files or from other sources when adjudicating an application or petition. It is important to remember however, that before you base an adverse decision on such information you provide the applicant or petitioner with an opportunity to rebut the information, unless the applicant or petitioner was already aware of such information, or could reasonably be assumed to be aware of such information. See 8 CFR 103.2(b)(16).